FOR ARGUMENT

In The
Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

v.

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

BRIEF FOR RESPONDENTS

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INTRODUCTION

The Respondents have no fundamental quarrel with the Statement of the Case submitted by the Petitioners Pinetop Logging Co. (hereinafter "Pinetop") and White Mountain Apache Tribe (hereinafter "WMAT"), with a few notable exceptions.

First, while the Statement of the Case is "... rich in detail ..." (Brief for Petitioners, p. 5), in some respects it occasionally makes legal arguments instead of factual recitations and contains some inaccuracies, albeit most likely as a result of typographical errors. For example, at p. 8, the Petitioners reference 1971 as being the year wherein the net

profit from all WMAT tribal enterprises was $1,667,091, of which $1,508,713 was derived from its Fort Apache Timber Company (hereinafter "FATCO") operations. The correct year is 1973, not 1971. (*See* App. 15).

Moreover, the Petitioners frequently characterize Pinetop as being an "agent" of the tribe rather than an "independent contractor." The Petitioners' characterizations of Pinetop as being an "agent" are inconsistent with its contentions in the Petition for Writ of Certiorari (Pet., p. 6) and with its verified complaint in the Arizona proceedings (Pet.App., p. 5a (¶ix)). Pinetop's operations as a log-hauling contractor are conducted pursuant to various contracts executed between Pinetop and FATCO and are approved by, if not actually drafted by, the Bureau of Indian Affairs (hereinafter "BIA") (A.9-10, 17).

In an attempt to address the issues raised by the Petitioners, as well as those of the United States as amicus curiae, in a unified fashion, the Respondents will treat the arguments of both in a single brief.

SUMMARY OF ARGUMENT

It is the Respondent state officials' position that the Arizona use fuel tax (Ariz. Rev. Stat. § 28-1552; Pet.App. 60a-61a) and the Arizona motor carrier tax (Ariz. Rev. Stat. § 40-641; Pet.App. 63a-64a) are properly applied to the non-Indian, independent log-hauling contractor, Pinetop Logging Co., and that these state taxes are preempted by neither the federal statutes governing Indian reservation forestry programs nor the federal regulations promulgated to implement said statutes.

Moreover, these state taxes constitute neither an infringement of Indian tax immunities nor a threat to Indian self-government under either *Williams v. Lee*, 358 U.S. 217 (1959) or *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). On the contrary, there is nothing in either of those cases to suggest that Congress intended to

preempt these state taxes or to grant tax immunities to a non-Indian independent log-hauler who has entered into contracts such as those existing between Pinetop and WMAT.

Finally, the legislative history of both the Hayden-Cartwright Act (4 U.S.C. § 104) and the Buck Act (4 U.S.C. §§ 105-110), when viewed in connection with the *McClanahan* case, demonstrates that these state taxes are properly imposed and that this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) stands as no obstacle to the continued levy of the taxes upon Pinetop.

Accordingly, the lower court's judgment should be affirmed.

I

NONE OF THE FEDERAL LAWS OR REGULATIONS IN QUESTION PREEMPT THE STATE TAXES HEREIN

A. Established doctrines of federal preemption of state laws as articulated by this Court confirm that the state taxes herein have not been preempted.

If there be a single, major thesis discernable in the Brief for Petitioners, as well as in that of the United States as amicus curiae, it is this: the purportedly all-pervasive, comprehensive and exclusive federal scheme dealing with Indian reservation forestry operations ousts the states of jurisdiction to tax non-Indian contractors with whom either the Indians or the Bureau of Indian Affairs (BIA) may contractually deal in connection with the accomplishment of the various forestry operation objectives. The depth of the preemption, so the contention goes, is such that there is absolutely no room left within which such state laws — re-

gardless of either the magnitude of their economic effect or the nature of their substantive legal incidence — may continue to operate. An examination of the viability of this premise therefore seems appropriate.

To begin with, concepts of federal preemption, while occasionally traceable to various ancillary constitutional provisions, have as their common source Article 6, Section 2 of the Constitution: the Supremacy Clause. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-152 (1963). While this section mandates that federal enactments shall be the supreme law of the land, there remains for examination the reach and scope of the federal law vis à vis potentially conflicting or inconsistent state laws.

Accordingly, this Court has stated that constant vigilance is necessary to insure that the application of state law poses "... no significant threat to any identifiable federal policy or interest ...," *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1838 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966), that the actual or asserted clash between the state and federal law "... be of substance and not merely trivial or insubstantial ...," *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 423 n.20 (1973) and that, since preemption of a state law "... is not lightly to be presumed ...," *Dublino, supra* at 413 quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952), it can occur only when the relationship between the state and federal laws is "... absolutely and totally contradictory and repugnant ...," *Goldstein v. California*, 412 U.S. 546, 553 (1973).

In this regard, while a substantial, actual and irreconcilable conflict between federal law and state law may, upon the facts of individual cases, provide a basis for preemption, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court has repeatedly expressed its reluctance to infer federal preemption of state laws in the absence of a clear and unmistakable manifestation of such intent by Congress. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *DeCanas v. Bica, supra* at 357-358 n.5; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1975).[1] Thus, where Congress manifests its intention to circumscribe its regulation and thereby preempt a limited area, state laws which properly exist and operate beyond the federal sphere are not "... forbidden or displaced ...," *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

With this backdrop of information, the limits of the inquiry in the case *sub judice* come more sharply into focus. If, as Pinetop, WMAT and the United States contend, there is contained within the federal laws and regulations herein a clearly manifested congressional intent to forbid these state taxes as constituting a significant, substantial and repugnant threat to Indian forestry operations, the dispute is at an end, the Petitioners and amicus curiae are right and the lower court ruling should be reversed. However, unless such a specific intent is found, these state taxes should be permitted continued operation. The Petitioners' advocation of a rule of inferred preemption under *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), Brief for Petitioners, p. 21, must therefore be scrutinized against the backdrop of preemption cases decided by this Court subsequent to *Rice v. Santa Fe Ele-*

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[1] This reluctance — with some notable exceptions (*e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)) — has continued for many years and has been articulated in a wide variety of cases. *See, e.g. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79 (1939); *Mintz v. Baldwin*, 289 U.S. 346 (1933). *See also, generally*, Note, "The Preemption Doctrine," 75 Colum.L.Rev. 623 (1975).

vator Corp., 331 U.S. 218 (1947). An examination of the federal provisions alleged by the Petitioners to be controlling reveals that the rule of inferred preemption so sought is not only unavailable, it is nonexistent.

B. The federal laws and regulations relied upon by the Petitioners are concerned with a field of activity other than state taxes levied upon non-Indian log-haulers on reservations.

As Pinetop and WMAT exhaustively contend,[2] the objective of the federal laws and regulations is multifaceted. However, 25 C.F.R. § 141.3 sets forth the major goals of the forestry program as to both allotted and unallotted Indian forest lands. Among these objectives are the preservation of the forest lands in a perpetually productive state through the application of "... sound silvicultural and economic principles to the harvesting of the timber ..." (25 C.F.R. § 141.3(a) (1)), the development of these forests to the end that the Indians will receive the "stumpage value"[3] of the timber as well as "... whatever profit it is capable of yielding ..." (25 C.F.R. § 141.3(a) (3))[4] and the sale of Indian timber "... in open competitive markets in accordance with good business practices ..." (25 C.F.R. § 141.3(a) (4)).

[2] The United States so asserts as well, but more succinctly.

[3] "Stumpage value" is defined in 25 C.F.R. § 141.1(c) as the "... value of uncut timber as it stands in the woods."

[4] Pinetop and WMAT improperly equate the concept of "whatever profit" a commercial enterprise is capable of yielding with the somewhat dissimilar notion of "... entire financial benefit ..." of such an operation. *See* Brief for Petitioners, pp. 17, 46-47. By this contention the Petitioners seem to suggest that *any* costs of Pinetop which in one fashion or another affect FATCO's maximum imaginable profit are forbidden. The apparent justification for this argument is that, without regard to the magnitude of the economic burden of Pinetop's taxes contractually borne by FATCO, their source (a state tax on a non-Indian) as opposed to their nature (one among a multitude of costs borne by the non-Indian) renders them impermissible. Such a contention is at odds with several other relevant federal provisions. *See, e.g.*, 25 U.S.C. § 413 and 25 C.F.R. § 141.18 providing for the deduction of reasonable administrative expenses from the gross proceeds of tribal timber sales.

Pinetop, WMAT and the United States dwell at some length in their respective briefs over additional silvicultural and related aspects of these forestry provisions.[5] But when all is said and done, the image that emerges is not one compelling the conclusion that Congress intended to prohibit the imposition of these taxes. On the contrary, the picture is one of a federal objective of protecting the Indian forest resource while recognizing — rather than ignoring — that the tribal forestry operations do not exist in a vacuum, free of any and all external influences which might, in one way or another, indirectly and/or trivially affect the ultimate mode of the program and/or its result. *See* Arguments II, III, *infra*.

In this regard, the regulations contemplate not the realization of the highest imaginable profit, *viz.*, the gross economic benefit. Rather, they envision the existence of the tribal program as a part of its larger existence in society as a whole. Significantly, there is no discernable intent to set prices for the timber (subject to 25 C.F.R. § 141.3(a) (4)) or to forbid the recovery of costs by contractors who deal with the Indians or the BIA on their behalf. On the contrary, quite the opposite appears to have been intended. *See, e.g.*, 25 U.S.C. § 413; 25 C.F.R. § 141.18. Under these circumstances, the basis for the Petitioners' reliance on *Warren* becomes obscure.

[5] Such additional aspects include, for example, cutting restrictions (25 C.F.R. § 141.5), bid requirements (25 C.F.R. § 141.11), bonds (25 C.F.R. § 141.14), fire protective measures (25 C.F.R. § 141.21) and so on. Similar, though not identical considerations characterize the provisions of 25 C.F.R. Part 142. However, *cf.* United States Amicus Curiae Brief, p. 17, n.12, suggesting that 25 C.F.R. Part 142 might not apply to FATCO lumber sales. The Petitioners (but not the United States) cite *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977) (*see* Brief for Petitioners, p. 46 n.31) in support of their position. The case is without materiality herein as the issue involved tribal rights as a creditor in bankruptcy court rather than state taxation of a non-Indian dealing with a tribal enterprise.

This is not to suggest, however, that because the tribal operation, FATCO, has seen fit to deal with a non-Indian logging contractor such as Pinetop, that, for that reason, the taxes in question are not preempted and may continue in operation. Rather, the point is simply that the federal sphere of concern is not invaded through the application of these taxes. If the contrary were the case, Congress could have easily spoken its intent by prohibiting all state occasioned expenses — not just the taxes here in question — which might affect a non-Indian log-hauler's ability to complete its contractual obligations for the tribe and/or the BIA for a consideration as close to a gratuity as possible.

Such an objective, of course, is neither practical nor desirable: if a non-Indian with whom the Indians or the BIA may deal by way of contract is prohibited from reimbursing himself for his costs, whether they be in the form of labor expenses, equipment expenditures or similar "overhead", he may refuse to deal with either. But this circumstance can in no way serve as rational justification for the extrapolated conclusion that the non-Indian's contractual attempt to seek recompense for one of his costs operates, *nunc pro tunc*, to eliminate the source of the cost itself.

For example, if Pinetop and FATCO had structured their relationship so that the log-hauling contracts had been between Pinetop and the BIA, the latter conducting the negotiations for FATCO and/or WMAT under its asserted plenary powers to control Indian forestry operations, would the economic burdens of the state taxes as levied herein upon Pinetop have been impermissible? Moreover, would the economic burdens of the state taxes levied upon Pinetop with respect to which there is no protest have been similarly prohibited?[6] If consistency is to characterize Pinetop's theory, then the answer must be that these ex-

[6] Pinetop states that it kept accurate records of the mileage it traversed on state highways within the Fort Apache Indian Reservation and that the state taxes "... allocable to those uses have been paid without protest ..." (Brief for Petitioners, p. 13).

penses are similarly forbidden, for they decrease the "... entire economic benefit ..." by increasing the costs to the BIA, thereby creating the potential for the deduction of greater sums from the gross receipts from timber sold under 25 C.F.R. § 141.18. Under decisions of this Court such as *United States v. County of Fresno*, 429 U.S. 452 (1977), *Gurley v. Rhoden*, 421 U.S. 200 (1975), and *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937),[7] the economic burdens of the taxes, when contractually "passed on" to this federal agency (BIA), would not be preempted. *Cf. In The Matter of State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.Dak. 1978), citing with approval *Department of Revenue v. Hane Construction Co., Inc.*, 115 Ariz. 243, 564 P.2d 932 (Ct.App. 1977), the former case being cited and discussed by the United States as amicus curiae (United States Amicus Curiae Brief, p. 21, n.13) in an attempt to distinguish it from the instant case.

While the foregoing discussion may at first glance appear to have more relevance to questions involving infringement and Commerce Clause theories, under Article 1, Sec. 8,[8] it is also germane to the issue of preemption. As heretofore noted, the determination as to whether or not a federal enactment preempts state law turns upon a number of varied yet interrelated factors. These considerations include analyses of whether the purportedly forbidden state law constitutes a *significant* threat to an identifiable federal policy[9] or whether its effect is trivial or insubstantial insofar as the integrity of the preempted federal sphere is

[7] *See, also*, 58 I.D. 562, 566 (1943), discussing the relationship between the decision in *Superintendent v. Commissioner*, 295 U.S. 418, 421 (1935), and the appropriate resolution of the question of whether or not the economic burdens of state taxes which increase the cost to the Federal Government of goods purchased for the Indians render the levy of the taxes upon a non-Indian vendor invalid in the first place: the conclusion was that they do *not* so invalidate the tax.

[8] *See*, Arguments II, III, *infra*.

[9] *Burks v. Lasker, supra*, 99 S.Ct. at 1838.

concerned.[10] In this regard, and by way of illustrative example, a brief analysis of one discrete aspect of the various arguments advanced by Pinetop, WMAT and the United States may prove enlightening.

Both Pinetop and WMAT contend that the two taxes in question, levied by state law upon the non-Indian taxpayer, Pinetop, and by that entity characterized as a business cost to be contractually "passed on" to FATCO,[11] are preempted and prohibited because, among other reasons, the magnitude of their economic burden (purportedly some $9,000 on an annual average) is speculative and "... not grounded in the evidence of record ...," the actual economic effect assertedly being "... many times greater than the state court was willing to acknowledge."[12] The United States as amicus curiae adopts the same position, observing somewhat critically that the assumed $9,000 figure was viewed by the Arizona courts as being a *de minimus* burden.[13]

However, an examination of the record will reveal that for example, in 1973, actual figures *do* exist and, indeed, are derived *in toto* from verified allegations and affidavits made by Pinetop and WMAT. In 1973, Pinetop paid under protest Arizona (1) use fuel taxes in the sum of $5,018.97 and (2) motor carrier taxes of $2,770.61.[14] The Chairman of the White Mountain Apache Tribal Council, Fred Banashley, avowed that, during that same one-year period, the

[10] *New York State Department of Social Services v. Dublino, supra,* 413 U.S. at 423, n.20.

[11] These costs are "shifted" by Pinetop to FATCO as a normal incident of contractual negotiation: there is no requirement of state law that the legal liability for these taxes be shifted over to or the tax itself collected from either FATCO, WMAT or the BIA. Thus, quite properly, there is no serious contention by either Pinetop, WMAT or the United States that the legal incidence of these taxes — as opposed to the contractual economic incidence — falls upon any entity other than Pinetop.

[12] Brief for Petitioners, pp. 16, 45.

[13] United States Amicus Curiae Brief, p. 23.

[14] *See* (1) Pet. App., p. 2a and (2) Record on Appeal, Plaintiffs' Exhibits "A" and "B", Item 15, pp. 15a, 15b.

FATCO operations generated a net profit of $1,508,713 out of a total net profit from all WMAT tribal enterprises of $1,667,091.[15]

From the foregoing, basic arithmetic reveals that, during 1973, the ratio of Pinetop's use fuel tax, motor carrier tax and combined use fuel/motor carrier tax to FATCO's and WMAT's total net profits ranged, respectively, from a *high* of 0.52% to a *low* of 0.17%.[16] Stated otherwise, the *maximum* calculable economic impact that both of these taxes had upon FATCO's and/or WMAT's *net* profits for that year amounted to some one-half of one percent. By way of comparison, the *minimum* administrative charge which could be levied upon the *gross* receipts to FATCO from timber sales pursuant to 25 C.F.R. § 141[illegible]8 would have been 5% of said gross, or at least some ten times higher than the highest percentage possible under the foregoing, actual figures.

The Respondents would respectfully suggest that these contractually assumed costs are something less than that which could reasonably be expected to "... [bleed] the White Mountain Apache Tribe's timber program of too much of its financial strength and ... [bring] it 'to its knees'. " *Cf.* Brief for Petitioners, pp. 45-46. The State

[15] *See* Banashley affidavit, (App. p. 15). In an apparent typographical error, Pinetop and WMAT erroneously assert (Brief for Petitioners, p. 8) that these figures relate to the year 1971; Mr. Banashley's affidavit establishes that the correct year in question is 1973, not 1971.

[16] *Viz.:*
1 (A) Pinetop use fuel tax/FATCO net profit: 0.003327
(B) Pinetop use fuel tax/all WMAT net profit: 0.003011
2 (A) Pinetop motor carrier tax/FATCO net profit: 0.001836
(B) Pinetop motor carrier tax/all WMAT net profit: 0.001662
3 (A) Pinetop combined (1 + 2) / FATCO net profit: 0.005163
(B) Pinetop combined (1 + 2) / all WMAT net profit: 0.004673

would further note that it does *not* urge that the insubstantiality of the economic burden of a non-Indian's tax contractually borne by an Indian constitutes, by itself, justification for the levy of the tax to begin with. However, where the magnitude of that burden, however calculated, never exceeds some one-half of one percent of the *net* profit of the Indian enterprise purportedly crippled by that cost, it is somewhat incongruous to suggest, as do Pinetop and WMAT, that, upon those grounds, the tax constitutes a substantial threat to the accomplishment of the federal objectives and/or infringes upon the Indians' right of self-government under *Williams v. Lee*, 358 U.S. 217 (1959).

Finally, while more will be said about the case in subsequent sections of this brief, the decision in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) is not only legally and factually distinguishable from the present dispute, the rationale of that case fails to support the conclusion that the state use fuel and motor carrier taxes herein are preempted. *Warren* was decided upon the grounds that a non-Indian, federally licensed Indian trader was so pervasively regulated by federal law that his business activities could not be subjected to the Arizona transaction privilege tax. The tax, this Court held, would impose burdens upon the trader or the Indians in addition to those prescribed by Congress or the tribes. The resultant effect, the decision held, would be to impermissibly disrupt the federal objective of protecting Indians from unfair or unreasonable price depredations at the hands of the traders.

In the present case, the federal objective is quite different, emphasizing protection of the forest resource and promotion of tribal forestry programs in a context recognizing the role of non-Indian contractors in effectuating this goal. The law and regulations relied upon by Pinetop, WMAT and the United States contain no ascertainable intention to either insulate non-Indians from nondiscriminatory state taxes or shield Indians or the BIA from each and every cost which might somehow touch the forestry

operation. Indeed, 25 C.F.R. § 141.18 indicates that just the opposite was intended by Congress. *See also* App., p.17, wherein Pinetop's contract establishes its responsibility for taxes.

The holding in *Warren*, therefore, is not controlling in the present case. As the analysis of the *Warren* reasoning set forth hereafter will demonstrate, these state taxes offend neither Article 6, Section 2 (the Supremacy Clause) nor Article 1, Section 8, Clause 3 (the Commerce Clause). While the federal tribal forestry programs seek to protect the physical well-being of the timber as well as attempt to foster whatever economic benefits the sale of the forest products may, within the context of Anglo-American society, generate for the Indians, there is no identifiable congressional intent to preempt state laws which may affect non-Indian contractors retained to assist in the endeavor.

Accordingly, the state taxes in question should not be declared superseded and the Arizona Court of Appeals' judgment to this effect should be affirmed.

II

THERE IS NO IMPERMISSIBLE INFRINGEMENT UPON TRIBAL SELF-GOVERNMENT

The corollary to the Petitioners' argument that the state laws in question have been preempted is the assertion that, under *Williams v. Lee*, 358 U.S. 217 (1959), their continued operation will violate the doctrine that, absent governing acts of Congress, state laws should not be permitted to infringe upon the right of reservation Indians to make their own laws and be ruled by them. The kindred assertion is made that, under *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), the imposition of these taxes upon Pinetop, a non-Indian, results in an infringement upon the right of FATCO and WMAT, Indian entities, to self-govern because of the adverse effect occasioned by the contractual assumption of their economic burden by FATCO. It is the State's position that not only is the Petitioners' parade of horribles composed of largely illusory

concerns, even if actual effects of these taxes are felt by FATCO or WMAT, they do not infringe upon any right of self-government otherwise enjoyed by the Indians.

At this point, and by way of prefatory explanation, it is the Respondents' position that the issues herein are far more subtle, complex and difficult to resolve than suggested by the briefs of Pinetop, FATCO or the United States. Reliance upon generalized notions of federal preemption and the holding in *Warren*, it is respectfully submitted, are insufficient, standing alone, to support a thorough, objective and rational solution to the dispute. Thus, a somewhat detailed documentation of the cases and other authorities believed to validate the Respondents' arguments is deemed required. While the Respondents have attempted to limit the following discussion, they remain committed to the proposition that the correct analysis of the problem necessitates the detailed examination to follow.

Accordingly, and in this regard, this Court has frequently invalidated state taxes which, by the terms of the state statutes themselves — as distinguished from the terms of contractual agreements (express or implied) existing between Indians and non-Indians with whom they deal — place the direct legal incidence and liability for the tax upon the Indian.[17] Just as frequently, however, the Court

[17] *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. State Tax Commission of Arizona, supra.*

has upheld the imposition of state taxes which are confined in their legal, as opposed to economic incidence, to non-Indians.[18]

Moreover, in a wide variety of cases which have come before this Court seeking review by way of certiorari or appeal, only to have certiorari denied or the appeal dismissed for want of a substantial federal question,[19] lower court rulings upholding the levy of state taxes upon non-Indians have been allowed to stand despite certain resultant adverse economic ramifications, either actual or potential, to reservation Indians or Indian tribes or

[18] *See, e.g., Moe v. Confederated Salish and Kootenai Tribes, supra; Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264 (1898); *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28 (1885). Indeed, where the state tax is applied to activities *beyond* the limits of Indian reservations, general, non-discriminatory state taxes may be directly imposed upon Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); 57 I.D. 124, 126 (1940); 58 I.D. 562, 567 (1943).

[19] While the denial of certiorari is not to be viewed as an expression of opinion on the merits of a case, *United States v. Carver*, 260 U.S. 482 (1923), the dismissal of an appeal for want of a substantial federal question is to be viewed as a ruling on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). *But see State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 99 S.Ct. 740, 749-750 n.20 (1979).

bands.[20] And the same result is reflected in various state court decisions where review by this Court was sought by neither the non-Indian taxpayer, the Indians with whom it dealt nor the federal agency involved on behalf of the Indians.[21]

The rules articulated in these cases — involving questions of the taxability of non-Indians who deal with Indians — are, from a conceptual tax standpoint, indistinguishable from the many decisions of this Court upholding the imposition of state taxes (chiefly business excise privilege or sales taxes) upon non-Indian persons or entities who deal with the ultimate sovereign in this nation, the United States of America. These cases, in clear and unambiguous terms, establish that, where the legal incidence of a state tax is imposed upon a business entity which thereafter contractually "shifts" the economic burden or cost of the tax to

[20] *See, e.g., Fort Mojave Tribe v. San Bernardino County,* 543 F.2d 1253, 1255-1256 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184, 1186-1187 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), *rehearing denied* 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied,* 409 U.S. 901 (1972); *Kahn v. Arizona State Tax Commission,* 16 Ariz.App. 17, 18-21, 490 P.2d 846, 847-850 (1971), *appeal dismissed* (want of substantial federal question) 411 U.S. 941 (1973) (Brennan, Douglas, JJ., dissenting with opinion, 411 U.S. at 941-944); *Makah Indian Tribe v. Tax Commission,* 72 Wash.2d 613, 615-617, 434 P.2d 580 581-582 (1967), *appeal dismissed* (want of substantial federal question) 393 U.S. 8 (1968). In this regard, and with respect to the *Moe* decision, *see also* the discussion of the adverse economic consequences actually or potentially borne by Joseph Wheeler, the Indian cigarette merchant, in the Appellee/Cross-Appellants' Opening Brief, USSC Doc. Nos. 74-1656 and 75-50, October Term, 1975, p.23, n.26. It is unclear from either the District Court's opinion or this Court's opinion in *Moe* whether Mr. Wheeler was a federally licensed Indian trader. *See Confederated Salish and Kootenai Tribes v. Moe,* 392 F.Supp. 1297, 1311 (D. Mont. 1975).

[21] *See, e.g., In the Matter of the State Motor Fuel Tax Liability of A.G.E. Corp., supra; Department of Revenue v. Hane Construction Co., Inc., supra; G. M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P.2d 277 (1976); *Chief Seattle Properties, Inc. v. Kitsap County,* 86 Wash.2d 7, 541 P.2d 699 (1976).

the United States,[22] the tax does not constitute an impermissible infringement upon or interference with the sovereign immunity from state taxation enjoyed by the United States.[23]

The effect of the foregoing decisions insofar as the proper resolution of the case *sub judice* is concerned is to demonstrate that the question of interference with tribal rights of self-government under *Williams* and/or infringement of reservation Indian immunities from state taxation (as distinguished from insulation from the costs of such taxation engendered by contract doctrines) under *McClanahan* are confusing and complicated. Neither Pinetop, WMAT nor the United States accord to the foregoing decisions of this Court or the principles espoused therein any more than the most abbreviated consideration. Instead, the decision in *Warren* is relied upon by Pinetop and WMAT (Brief for Petitioners, *passim*) and the United States (United States Amicus Curiae Brief at 9, 10, 19, 21-22 n.13) to such a depth that, in the words of the Brief for Petitioners, p. 25, the case is "... so strikingly similar to this one that it overshadows all other precedents." (Footnote omitted.) Accordingly, a somewhat detailed inquiry into the rationale underlying *Warren*, as evidenced by the legislative histories of the Indian trader's statutes (25 U.S.C. §§ 261, *et seq.*), the Hayden-Cartwright Act (4 U.S.C. § 104), the Buck Act

[22] This contractual "shifting" is to be carefully distinguished from situations where the state law *mandates* the collection of the tax from the customer or vendee of the business, in which latter event the tax becomes, for federal purposes, a vendee liability and impermissible vis à vis purchases by the United States or its instrumentalities. *See, e.g., Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976), *citing First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 346-348 (1968). *Cf. Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 123-124 (Black, J., dissenting (with concurrence by Warren, C. J. and Douglas, J.)), 124-127, (Douglas, J., dissenting, (with concurrence by Warren, C.J., and Black, J.)) (1954).

[23] *See, e.g., Gurley v. Rhoden, supra; Alabama v. King & Boozer,* 314 U.S. 1 (1941); *James v. Dravo Contracting Co., supra; Alward v. Johnson,* 282 U.S. 509 (1931).

(4 U.S.C. §§ 105-110), as well as the precedent and opinions relied upon in the decision, is necessary. Such an examination, the Respondents would submit, will support the conclusion that not only do these state taxes fail to in any way infringe upon WMAT's right of self-government, it will reveal specific congressional authority supporting the levy even *if* infringement would have otherwise been found.

III
WARREN TRADING POST COMPANY V. ARIZONA STATE TAX COMMISSION IS NOT CONTROLLING

A. Introduction

This Court has held that the Arizona transaction privilege tax (Ariz. Rev. Stats. §§ 42-1301 *et. seq.*) cannot be imposed upon a federally licensed Indian trader engaged in the business of Indian trading with Indians on an Indian reservation. *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). To permit the taxes, the opinion states, (380 U.S. at 691) would be to

> "... put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and ... thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission."

This language articulates the concern in terms of prices and additional financial burdens rather than in terms of state taxes *qua* taxes. In this respect, the statement is consistent with the long-standing congressional design to protect and shield the Indians on reservations from the economic depredations they might otherwise actually or potentially suffer at

the hands of unscrupulous traders.[24] Such a concern to protect reservation Indians from unfair or unreasonable prices, however, is not synonymous with an objective to prohibit licensed Indian traders from seeking reimbursement for their costs plus a profit. Indeed, the Code of Federal Regulations suggests that just the opposite was intended by Congress. *See, e.g.,* 25 C.F.R. § 252.55 providing for price monitoring and control as well as recovery of the trader's costs plus a "... reasonable markup."

It is the Respondents' position, therefore, that the proper inquiry, insofar as the decision in *Warren* is concerned, is whether or not, in the context presented, Congress intended to either infer or imply a preemption of state use fuel and/or motor carrier taxes as applied to non-Indian contractors who deal with Indians pursuant to federally-approved contracts. The concern is two-fold, requiring first a resolution of the question of the scope of the federal scheme: is it, in reality, so all-pervasive that, like a giant magnet, it draws within its influence all matters, direct and indirect, which may be perceived to affect the federal objective in any way? The answer to this question is set forth in Argument I, *supra.* The remaining inquiry focuses on the Hayden-Cartwright Act (4 U.S.C. § 104) and the Buck Act (4 U.S.C. §§ 105-110).[25]

B. The legislative history of the Hayden-Cartwright Act and the Buck Act supports the levy of the taxes herein.

In connection with their theory that the Hayden-

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[24] *Warren, supra,* 380 U.S. at 689 n.4. *See, also,* F. Cohen "Handbook of Federal Indian Law" (U.S. Department of Interior 1945) at 348 n.2 detailing the various congressional enactments bearing upon this subject. *Cf. Rockbridge v. Lincoln,* 449 F.2d 567 (9th Cir. 1971) outlining some of the concerns.

[25] Pinetop and WMAT discuss the Buck Act in connection with an attempt to avoid the operation of the Hayden-Cartwright Act at pp. 56-60 nn. 34, 35, Brief for Petitioners. The United States as amicus curiae also discusses the Buck Act in connection with the Hayden-Cartwright Act, United States Amicus Curiae Brief, pp. 21-22 n.13.

Cartwright Act does not apply to Indian reservations, Pinetop and WMAT argue (Brief for Petitioners, p. 58 n.35) that the legislative history of the Buck Act, as well as footnote 18 in *Warren*, establish that no intent to extend the provisions of the former Act is discernable from the Committee Reports and floor debates relating to the legislation. The Petitioners' argument is that, since this Court stated in *Warren* that the Buck Act did not apply to Indian reservations, and since the 1940 amendment by the Buck Act of § 10 of the Hayden-Cartwright Act (now codified at 4 U.S.C. § 104) purportedly "... integrated into the Buck Act ..." said § 10, the conclusions set forth in footnote 18 of *Warren* require the result that § 10 of the Hayden-Cartwright Act (*i.e.*, 4 U.S.C. § 104) is similarly inapplicable to Indian reservations.[26]

To support this contention, Pinetop and WMAT cite by an "accord" prefatory signal this Court's decision in *McClanahan*, 411 U.S. at 176. Pinetop and WMAT then express interest in the purported fact that, in *McClanahan*, this Court

> "... cites 4 U.S.C. § *104* as being part of the Buck Act - an accurate characterization in light of the Hayden-Cartwright Act's amendment by and integration into the more comprehensive Buck Act." (Emphasis added).

In point of fact, however, the correct citation to the statute at which the codification of the Buck Act begins is 4 U.S.C. § *105* rather than 4 U.S.C. § 104.[27] An examination of the official reporter reveals that, contrary to the beliefs of Pinetop and WMAT, this Court held that

[26] *See* Brief for Petitioners, p. 58 n.35.

[27] *See* the Official United States Reports, Vol. 411, page 176 and *compare with* either of the two major commercial parallel reporter services, 93 S.Ct. at 1264 and 36 L.Ed.2d at 138.

> "... Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § *105 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas.*" (Emphasis added).

In their zeal to demonstrate that § 10 of the Hayden-Cartwright Act (4 U.S.C. § 104) does *not* apply to Indian reservations, Pinetop and WMAT have instead generated several compelling indications suggesting that it *does* so apply.

First, the Petitioners have shown that, whatever interpretation this Court has placed upon the Buck Act in either the *McClanahan* or *Warren*[28] decisions, the Hayden-Cartwright Act had a different legislative history. Any questioning of the contention, therefore, that the Buck Act *does* apply to Indian reservations would not affect the applicability of the Hayden-Cartwright Act. Stated otherwise, while this Court in *Warren* has stated for various reasons that, in its opinion (380 U.S. at 691 n.18), the Buck Act does not apply to Indian reservations, it has not opined upon the applicability of the Hayden-Cartwright Act. However, *cf. Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P.2d 748 (1946), *cert. denied*, 329 U.S. 780 (1946) holding, *inter alia*, that § 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, applied within two federal areas (a flood control dam region and an aircraft plant) notwithstanding the fact that the fuel in question was not consumed upon public highways. *See* n. 20, *supra*.

Thus, by referencing the *McClanahan* case, Pinetop and WMAT have supplied the information which, under their theory, compels the conclusion that the use fuel and motor carrier taxes herein apply to Pinetop on the Fort Apache Reservation.

[28] *Warren* correctly cites the Buck Act as being codified at 4 U.S.C. §§ 105-110. *See* 380 U.S. at 691 n.18.

Second, and of somewhat greater significance, the Petitioners' underlying argument — apart from reliance upon *McClanahan* — that the Hayden-Cartwright Act does not apply on Indian reservations is at odds with the holding in 57 I.D. 129.[29] There, after a thorough and "... searching analysis of the problems presented, ..."[30] the Solicitor of the Interior Department held that while state taxes did not apply to sales of gasoline for direct use by the Menominee Tribe in the actual operation of the tribal lumber mill, the taxes *did* apply to sales of gasoline to employees of the mill and/or the general public, whether Indian or non-Indian. *See* 57 I.D. at 137-140.

In order to arrive at this conclusion, the opinion specifically considered the question of whether or not the phrase "United States military or other reservations" contained in § 10 of the Hayden-Cartwright Act evinced a congressional intent to apply the legislation to Indian reservations. In concluding that such, indeed, was the intent of Congress, the opinion noted that the legislative history demonstrated an intent to deal with Indian reservation roads under the Federal Aid Highway Act of 1936. The opinion noted, 57 I.D. at 139:

> "Moreover, when the amendment in question[31] was introduced, the agencies enumerated did not include licensed traders and filling stations.[32] The addition of these agencies by the conference committee[33] indicates an intent to broaden the application of the statute, and *the reference to "licensed traders" is particularly suggestive of Indian reservations.* These indications, while slight, are sufficient to give ground

[29] 57 I.D. 129 is cited in the brief of the United States (United States Amicus Curiae Brief, p. 21 n.13), but not in the Brief for the Petitioners.

[30] *See,* F. Cohen "Handbook of Federal Indian Law" (U.S. Department of Interior 1945) at 264.

[31] 49 Stat. 1521, § 10 of the Hayden-Cartwright Act.

[32] This is correct. *See* 80 Cong. Rec. 6913 (May 8, 1936).

[33] *See* House Conference Committee Report No. 2902, 74th Cong. 2d Sess. (June 1, 1936).

> for considering the broad language of the statute as including Indian reservations." (Emphasis added)

Accordingly, it is the Respondents' position herein, based upon the foregoing, that the Hayden-Cartwright Act was intended by Congress to apply to Indian reservations to permit the application of the taxes here in question to the fuels used by Pinetop (as distinguished from the FATCO sawmill near Whiteriver, Arizona)[34] in connection with its log-hauling operations.[35]

[34] *See* Pet. App., 4a.

[35] Throughout their brief, the Petitioners repeatedly assert that these taxes are impermissible because the tribal and BIA roads are purportedly neither built, maintained nor repaired by the State. The suggestion is thus created that Pinetop should not be subjected to the taxes because they are not expended to build, repair or maintain the BIA and tribal roads it uses and it is thus inappropriate to charge them for assertedly non-existent benefits. However, the General Manager of Pinetop, Mr. Carpenter, stated that, while he was not personally aware of any instance where state equipment or personnel had been so used, it was possible that such may have occurred. *See* Carpenter Depo., pp. 72-73. Furthermore, Pinetop concedes that it uses state highways that traverse the Fort Apache Indian Reservation and that as to that portion of its travels, it has paid the subject taxes without protest. Brief for Petitioners, p. 13. *See also* Carpenter Depo., area map exhibit.

Neither the allegation nor the fact, if established, that one subjected to state taxes does not share equally in benefits or services from the state is sufficient grounds for invalidating a tax upon him. *Wagoner v. Evans,* 170 U.S. 588, 592 (1898); *Thomas v. Gay,* 169 U.S. 264, 278 (1898); *Kelly v. Pittsburg,* 104 U.S. 78, 81-82 (1881). This "benefits/burdens" issue is a matter of state law which has been conclusively resolved against Pinetop's contention. *See Winkler Trucking Co. v. McAhren,* 60 Ariz. 225, 133 P.2d 757 (1943) holding, with respect to motor carrier taxes, that the tax applies to the gross receipts even if they include income attributable to travel occurring *off* of public highways. It is the State's position, of course, that the roads in question herein are public highways within the meaning of Ariz. Rev. Stat. § 40-601 (A) (11). *See* Pet. App., pp. 62a-63a; *see also* 25 C.F.R. § 162.8 (a) mandating "... free public use ..." of all roads eligible for construction and maintenance with federal funds under 25 C.F.R. Part 162 (Roads of the Bureau of Indian Affairs); *Sanders v. Oklahoma Tax Commission,* 197 Okla. 285, 169 P.2d 748 (1945), *cert. denied,* 329 U.S. 780 (1946).

Third, the Petitioners' reliance, albeit misplaced, upon *McClanahan* as bearing upon the relationship between the Buck Act and the Hayden-Cartwright Act necessitates a somewhat closer examination of that holding insofar as its analysis of the Buck Act is concerned. As previously seen, the opinion specifically states that the Buck Act, 4 U.S.C. §§ 105 *et seq.*, constitutes a clear manifestation of Congress' intent to shield reservation Indians from the imposition of the direct legal incidence of state taxes[36] and that the Act

> "... provides comprehensive federal guidance for state taxation of those living within federal areas." 411 U.S. at 176.

Through the enactment of the Buck Act, 54 Stat. 1059 (1940), specific congressional authority was granted to the states to impose and collect various taxes within "federal areas" as that term is defined in 4 U.S.C. § 110(e). In this regard, although authority to impose and collect state sales, use and income taxes exists by virtue of 4 U.S.C. §§ 105 and 106, 4 U.S.C. § 109 specifically exempts "... any Indian not otherwise taxed." An examination of the legislative history of the Buck Act will reveal substantial evidence of a congressional intent to provide for a complete allocation of taxing authority with respect to "federal areas" in an attempt to dispel the confusion and ambiguity then existing with respect to the taxation of persons and/or transactions occurring therein.

In 1939, Representative Frank H. Buck of California, first introduced legislation to provide for the application of state sales and use taxes in those areas where the federal government "... may have jurisdiction." *See* H. R. 6687, 76th Cong., 1st Sess., 84 Cong.Rec. 6737 (1939). Although this legislation passed in the House of Representatives (*see* 84 Cong.Rec. 10093), it did not survive through the Senate. The following year, the Senate Finance Committee made

[36] The issue in *McClanahan* — unlike that in *Warren* — was whether a Navajo Indian on her own reservation was subject to the direct levy of the Arizona income tax. *See McClanahan*, 411 U.S. at 166.

various amendments to the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt the imposition of state taxes, whether sales, use, or income, upon reservation Indians. *See* S.Rep.No. 1625, 76th Cong., 3rd Sess. (1940); Hearing on H.R. 6687 Before a Subcommittee of the Senate Committee on Finance, 76 Cong., 3rd Sess., (April 23, 1940) (hereinafter "Hearing"). After this hearing, H.R. 6687 was passed by both houses of Congress (October 9, 1940: 54 Stat. 1059) and, following its re-enactment and codification in 1947, became the present 4 U.S.C. §§ 105-110.

A report which had been prepared by Congressman Buck for the April 23, 1940 hearing articulated the purpose of the Act, Hearing, *supra*, pp. 3-4:

> "Recent decisions of the Supreme Court of the United States in the cases of ... [cases omitted], [37] while opening the way for the application of certain nondiscriminatory State taxes on Federal areas, except insofar as those taxes may constitute a burden upon the United States, have not clearly indicated the exact extent of state authority in this respect.
>
> "Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of State authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainity which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action, a precedent for which is to be

[37] The cases to which Congressman Buck referred were *James v. Dravo Contracting Company, supra, Silas Mason Company v. Tax Commission*, 302 U.S. 186 (1937), and *Atkinson v. State Tax Commission*, 303 U.S. 20 (1938).

found in an Act of Congress approved June 16, 1936, amending Section 10 of the Hayden-Cartwright Act (49 Stat. 1521; 23 U.S.C.A., § 55a) relating to State motor vehicle fuel taxes.

. . .

"A minor problem presented with respect to the application of State sales taxes on Federal areas involves the responsibility for such taxes of post exchanges, ship-service stores, commissaries, *licensed traders*, and other similar agencies operating on Federal areas." (Emphasis added).

The question of whether or not the grant of taxing authority under consideration should apply to Indian reservations was thus specifically considered. In fact, Representative Buck stated (Hearing, p. 2) that, in his personal experience, a problem existed with respect to taxes on sales

"... at commissaries, *licensed traders*, [*sic*] and other similar agencies. We had some bad situations with regard to these *licensed traders*. There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you [*sic*] have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods." (Emphasis added)

With regard to Congressman Buck's statement, *see Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F.Supp. 279, 281 (C.D.Cal. 1969) (subsequent case history omitted: *see* n.20, *supra*), establishing that the Agua Caliente Indian Reservation exists on a checkerboard pattern in the area of Palm Springs, California. This Court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation.

At the April 23, 1940 hearing, however, the United States Department of the Interior took a position that Indian reservations should be excluded from the reach of the Buck Act. *See* letter from E. K. Burlew, Acting Secretary of the Interior, March 13, 1940, Hearing, *supra*, pp. 39-40. In that letter, the Interior Department argued in favor of the so-called "LaFollette Amendment" which provided that "... this act [*i.e.*, the Buck Act] shall not affect existing law relating to taxation on Indian reservations."

The ultimate form of 4 U.S.C. § 109, however, followed the position urged by Representative Dempsey of New Mexico. *See*, Hearing, *supra*, pp. 18-20. His position was that the Buck Act should exempt *Indians*, but not Indian *reservations*, his view being that:

"... [W]e have no desire to tax the Indians. They are exempt from taxation in our state, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay."

As the foregoing legislative history demonstrates, the concern of the legislators was not over whether or not the Buck Act should apply to Indian reservations, but rather whether the Buck Act should authorize the levy of the direct legal incidence of state sales, use or income taxes upon reservation Indians. Indeed, the rejection of the LaFollette Amendment in favor of the position advocated by Representative Dempsey is conclusive proof that Congress considered Indian reservations to be "federal areas" within the purview of what eventually became 4 U.S.C. § 110(e). It also demonstrates that Congress continued to support an objective of shielding reservation Indians from the direct legal incidence of state taxes, but did not intend to shield *non*-Indians — including licensed traders — from such taxation if they were located within a particular type of federal area, an Indian reservation.

Returning, therefore, to the decision in *McClanahan*, the Court's ruling that the Buck Act provided comprehensive federal guidance for state taxation of those living within federal areas is clearly correct with respect to the particular federal area within which Rosalind McClanahan lived, the Navajo Indian Reservation. However, if an Indian reservation is a "federal area" for purposes of 4 U.S.C. § 109, should it not also be a "federal area" for purposes of 4 U.S.C. §§ 105 and 106? Unless the answer to this question is "yes," at this juncture something of a disparity may appear to exist between the conclusion in footnote 18 in *Warren* and the Court's subsequent ruling in *McClanahan*. In this regard, it is noteworthy that a total of eight briefs and/or memoranda filed by the parties and various amici curiae in the *McClanahan* case urged the uniform position that the Buck Act was either specifically, implicitly or impliedly applicable to Indian reservations.[38]

It is the Respondents' position, based upon the foregoing, that the conclusion reached in 58 I.D. 562, 563 (*see Warren*, 380 U.S. at 691 n.18) is inconsistent with the legislative history of both the Hayden-Cartwright Act and the Buck Act. Even if Pinetop were a licensed trader (which notion even the United States Amicus Curiae Brief rejects, p. 11, n.9), it should not be able to claim sanctuary upon the theory that

[38] These briefs were filed in the *McClanahan* case, USSC Docket No. 71-834, October Term, 1971: (1) Appellant's Supplemental Brief in Opposition to Appellee's Motion to Dismiss or Affirm; (2) Brief for Appellant; (3) Reply Brief for Appellant; (4) Memorandum for the United States as Amicus Curiae; (5) Brief for the United States as Amicus Curiae; (6) Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement; (7) Brief of Montana Inter-Tribal Policy Board as Amicus Curiae; (8) Brief for Amicus Curiae, National Congress of American Indians in Support of Appellant. In this regard, compare the similar although not identical position adopted by the United States as amicus curiae in *Kahn v. Arizona State Tax Commission*, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed* (want of substantial federal question), 411 U.S. 941 (1973) (Brennan, Douglas, J.J., dissenting with opinion, 411 U.S. at 941-944), Memorandum for United States as Amicus Curiae, USSC Doc. No. 71-1263, October Term, 1972, p. 5.

the Fort Apache Indian Reservation is not a "federal area." As this Court observed in *McClanahan* and as the parties and amici curiae therein (save the State of Arizona) argued, the Buck Act *was* intended by Congress to apply to Indian reservations.[39] The Respondents agree with the proposition that there is no intent expressed in the Buck Act to permit the direct application of State taxes (*i.e.*, the visitation of the legal incidence of said taxes) to reservation Indians. There is, however, a clear expression of intent by the Congress to extend the Buck Act to "licensed traders" on a particular species of federal area, *viz.*, Indian reservations.

An interpretation such as this will bring consistency to the decisions in the *Warren* and *McClanahan* cases and will be completely harmonious with this Court's decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). There, this Court held that where the legal incidence of a state tax fell upon an Indian, it was impermissible. However, where the legal obligation for the tax fell upon a *non*-Indian, it was upheld notwithstanding the facts that (1) the vendor was an Indian, (2) the vendor was an Indian seemingly clearly engaged in the business of Indian trading on an Indian reservation (*see* 25 U.S.C. §§ 261, 264; 25 C.F.R. Part 251), and (3) the vendor Indian demonstrated or alleged that adverse economic ramifications would unavoidably be placed upon him by mandate of state law (*i.e.*, the Montana "pre-collection" requirement: *see Moe*, 425 U.S. at 482) as a result of the imposition of the taxes upon his non-Indian customers.[40]

Accordingly, for the foregoing reasons it is the Respondents' position that both the Hayden-Cartwright Act (with respect to the Arizona use fuel tax, Ariz. Rev. Stat. § 28-1552) and the Buck Act (with respect to the Arizona motor

[39] A similar but more extensive discussion of this result is contained in the Brief of the Appellee in *Central Machinery Co. v. State of Arizona*, USSC Doc. No. 78-1604, October Term, 1979 (argued in tandem with the case herein).

[40] *See*, n.20, *supra*.

carrier tax, Ariz. Rev. Stat. § 40-641) are properly applied to the non-Indian, independent log-hauling contractor, Pinetop Logging Co. Rather than being preempted under the rationale of *Warren,* these state taxes neither invade the federal sphere of federal tribal forestry management nor do they infringe upon any right of self-government enjoyed by the White Mountain Apache Tribe.

CONCLUSION

As is true with respect to most questions involving the perplexing area of Indian law, answers are not always easily discernible. However, in the present case, the Respondents would respectfully submit that a thorough, candid and objective examination of the issues presented must lead to the conclusion that the Hayden-Cartwright Act and the Buck Act are the precise species of governing acts of Congress referenced in *Williams v. Lee, supra.* The decision of the Arizona Court of Appeals was correct when rendered and remains correct now. Accordingly, the decision should be affirmed.

Respectfully submitted,

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APPENDIX

4 U.S.C. § 104. Tax on motor fuel sold on military or other reservation[;] reports to state taxing authority.

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal

area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

4 U.S.C. § 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

4 U.S.C. § 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

4 U.S.C. § 110. Same; definitions

As used in sections 105-109 of this title—

. . .

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.